

FILE COPY

Office - Supreme Court, U. S.

FILED

JAN 19 1942

CHARLES ELMORE COOPER

CLERK

No. ~~887~~ 21

In the Supreme Court of the United States

October Term, 1941.

WARREN-BRADSHAW DRILLING COMPANY, *Petitioner,*

vs.

O. V. HALL, INDIVIDUALLY, AND AS AGENT OF W. N. SLAID, EDGAR SLAID, E. S. MORGAN, A. D. HARMON, J. M. HUDDLESTON, J. R. MILLER, AND B. R. GRAY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

FRANK SETTLE,
EUGENE O. MONNET,
SAM CLAMMER,

Attorneys for Petitioner.

INDEX.

	PAGE
Petition for writ of certiorari	1
Summary statement of the issues and facts involved. .	2
Reasons relied on for the allowance of certiorari.....	4
Brief and argument in support of petition for certiorari	6
Statement of the case	6
Specifications of error	6
Argument	7

Proposition I.

The act was not applicable to respondents because petitioner, as their employer, was at no time engaged in the business of mining for or producing oil or gas, or in any process for the production thereof, with the intent, hope or belief that its activities would result in the production of goods for interstate commerce.....

7

Proposition II.

A. Where a laborer is employed on a job without an express agreement as to wages, but expecting to be paid a weekly wage of a certain sum based upon an eight-hour day until the job is finished, and he accepts such amount in full satisfaction; and such payment is more than sufficient in amount to cover the minimum and overtime wage scale provided in the Fair Labor Standards Act, an agreement will be implied for a basic and overtime wage scale in compliance with the act.....

12, 13

B. That the acceptance by respondents of the compensation tendered by petitioner, as their employer, and accepted by them without objection, claim, or demand for an additional amount for overtime, and without notice that a claim for overtime will be made or presented should not subject petitioner to the penalty of double overtime

12, 14

TABLE OF CASES.

	PAGE
Dunphy v. Ryan, 116 U. S. 491, 29 L. ed. 703, 6 S. Ct. 486	14
Fleming, Administrator, v. A. H. Belo Corporation, 121 F. (2d) 207	13
Fleming v. Kirschbaum, 38 Fed. Suppl. 204	11
Gerdert, et al., v. Certified Poultry and Egg Co., 38 Fed. Suppl. 964	11
National Labor Relations Board v. Jones and McLaughlin Steel Corp., 301 U. S. 1, 81 L. ed. 893	11
United States v. Darby Lumber Co., 312 U. S. 144, 61 S. Ct. 451	9

TEXT BOOKS.

American Jurisprudence, Vol. 12, p. 500	14
Bureau of Mines, Crude Petroleum and Petroleum Products Review 1939 and 1940	8
Interpretative Bulletin No. 1, by the Federal Administrator of the Wage and Hour Division, Oct., 1940	9
Petroleum Facts and Figures, 7th ed., 1941, p. 80	8
Oil and Gas Journal, Jan. 30, 1941, Vol. 39, p. 52	8

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1941.

No. _____

WARREN-BRADSHAW DRILLING COMPANY, *Petitioner,*

vs.

O. V. HALL, INDIVIDUALLY, AND AS AGENT OF W. N. SLAID, EDGAR SLAID, E. S. MORGAN, A. D. HARMON, J. M. HUDDLESTON, J. R. MILLER, AND B. R. GRAY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Warren-Bradshaw Drilling Company respectfully shows to this Honorable Court:

1. That the case is an action at law brought by the respondents, as plaintiffs, against petitioner, as defendant, in the District Court of the United States for the Northern District of Texas, for the recovery of overtime under the provisions of the Fair Labor Standards Act of 1938, and for liquidated damages and attorney fees. The trial was by

the court without a jury, and the judgment was for the respondents.

2. Petitioner, as appellant, prosecuted an appeal from such judgment to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the judgment of the lower court.

3. The appeal involved a construction of Section 3 (j), Section 7 (a), and Section 16 (b), of the Fair Labor Standards Act, 29 U. S. C. A., 201, *et seq.*, the court holding and deciding:

(a) That the provisions of the act were applicable to the facts in the case, under which petitioner and respondents, as its employees, were held to be engaged in the production of goods for interstate commerce; and

(b) That each of the respondents, although admittedly working under no express agreement as to wages, and receiving as compensation for their work a sum of money far in excess of the minimum statutory amount, with over-time figured at time and a half of the minimum wage prescribed by said act, were nevertheless entitled to receive for all hours worked in excess of forty hours per week at the rate of one and one-half times the rate of pay they did receive.

4. A certified copy of the entire record of said case in the Circuit Court of Appeals for the Fifth Circuit is hereby furnished as an exhibit to this application.

Summary Statement of the Issues and Facts Involved.

1. It is not disputed that petitioner was the owner of rotary drilling equipment and was employed by the owners of oil and gas mining leases in drilling by means of such rotary equipment into the ground to a specified depth;

that when near to the anticipated location of the oil sand, petitioner removed its rig from the premises; and the petitioner's rotary outfit and respondents' employment on the job then ceased; that the well or hole, drilled by petitioner, was thereafter completed by means of cable tools operated by others than the respondents, and which process of deepening the hole with cable tools was expected by the lease owner to determine or demonstrate whether the well so completed was a producer of oil or a dry hole.

2. It is not disputed, in fact, that each job upon which respondents worked constituted a separate employment; that in none of these jobs or employments was there any express agreement between the petitioner and respondents about wages.

3. It is not disputed, as found by the District Court, that "all of them (respondents) drew rather good wages, ranging from around \$6.50 to \$7.00 and up to as high as \$11.00 per day for their work." Each of the respondents accepted payment of compensation without making any claim or demand for overtime, nor did either of them at the time of such payment give any notice that overtime would be claimed. The judgment of the court and the amount thereof is arrived at by determining the number of hours worked by each respondent during each week in excess of forty hours, or forty-two hours, as the case may be, and multiplying such number of hours by a figure representing one and one-half times one-eighth the daily wage received by the employee and then adding thereto the double penalty and attorneys' fees.

Reasons Relied on for the Allowance of *Certiorari*.

The case was decided by the Circuit Court of Appeals contrary to the argument and contention of petitioner, namely:

1. That the act did not apply to the petitioner or to the respondents as its employees, because they were not, upon the admitted facts as herein stated, engaged in commerce, nor in the production of goods for commerce, as said terms are defined by the act, and that the respondents were not therefore entitled to the benefit of said act.

2. That if the act was applicable, the record shows that in each instance the wages paid to the respective respondents was greatly in excess of the basic wage scale and time and a half for overtime, as provided by the act, and that therefore there was no violation of the act, but on the contrary, a compliance therewith.

3. The contrary holding and decision of the Circuit Court of Appeals therefore presents an important question of Federal Law involving the construction and interpretation of the act which has not been, but should be settled by this Honorable Court.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain therein to be designated, a full and complete transcript of the record, and all the proceedings of the Circuit Court of Appeals for the Fifth Circuit, in the said case, entitled *Warren-Bradshaw Drilling Company, Appellant, v. O. V. Hall, et al., Appellees*; No. 10,066, to the end that the said cause may be re-

viewed and determined by this court as provided by law, or that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate, and that the said judgment of the Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

WARREN-BRADSHAW DRILLING COMPANY,
Petitioner,

By SAM CLAMMER,

Attorney for Petitioner.

Of Counsel:

FRANK SETTLE,

EUGENE O. MONNET.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI.

The judgment of the District Court is found at pages 141-143 of the record, and the opinion and judgment of the Circuit Court of Appeals, not yet published, is found on pages of the record.

Statement of the Case.

This has already been stated in the preceding petition, which is hereby adopted and made a part of this brief.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding and deciding that the petitioner and respondents came within the provision of the Fair Labor Standards Act upon the ground that respondents, as employees of petitioner, who, under its employment by the owners of oil and gas mining leases, and in the course of prospecting for oil, partially drilled wells with rotary drilling equipment owned by petitioner, and which when later deepened and completed by others than petitioner and respondents, as its employees, to the oil sand, expected or anticipated to be a producing sand, did engage in the production of goods for interstate commerce.
2. The Circuit Court of Appeals erred in holding and deciding that the provisions of Section 7 (a) of the Fair Labor Standards Act were not complied with by the payment of compensation by petitioner to respondents, as its employees, and each of them, of a sum exceeding the statu-

tory amount, with overtime figured at one and one-half times the minimum wage prescribed by said act, although such sums were accepted by respondents without objection, or claim of overtime.

ARGUMENT.

PROPOSITION I.

(Specification of Error 1.)

The Act was not applicable to respondents because petitioner, as their employer, was at no time engaged in the business of mining for or producing oil or gas, or in any process for the production thereof, with the intent, hope or belief that its activities would result in the production of goods for interstate commerce.

It was the contention of the respondents that the drilling operations of petitioner under its employment by lease owners were conducted with the knowledge and in the belief that oil or gas in paying quantities would be produced if the hole drilled by it was later deepened to the oil bearing sand, and that he knew or should have known that the production from such completed well would move in interstate commerce. We do not think the record supports that contention.

It could be assumed, perhaps, that the various oil companies—the employers of the petitioner—engaged in the oil and gas mining business would be expected to be familiar with the particular field or territory in which they were operating, and with the data revealed by certain publications devoted to that subject, and which were called to the court's attention, relating to the productivity of the area, and also with the movement of the oil therefrom in com-

merce. (Petroleum Facts and Figures, Seventh Edition, 1941, p. 80; 39 Oil & Gas Journal, Jan. 30, 1941, 52; Bureau of Mines, Crude Petroleum and Petroleum Products Review 1939 and 1940).

It is difficult, however, to see, and therein we think lies the fallacy of the argument, on what principle petitioner can be charged with such knowledge, so that an intent, hope or expectation on its part that oil would be found, and that if produced it would move in interstate commerce, may be imputed to it. It was not engaged in mining for oil or gas or in the oil business at all. It used its rotary equipment in the same manner as if drilling, let us say, for water. Petitioner was not employed to drill a well, but to bore down to a point in proximity to the anticipated oil sand, and that when it reached that point it stopped (R. 36, 38, 39—Testimony of B. R. Gray, and R. 51—testimony of A. D. Harmon). The trial court found that, "As a practical matter, in the drilling of these oil wells, the defendant (petitioner) used rotary rigs for drilling of the wells down to, or near to, the pay sand. At that juncture the rotary crews would cement the casing at or near the expected pay sand, and then would withdraw all the rotary machine and another crew would move in and complete the well, bring it in, or demonstrate that it was a dry hole, with cable tools." (R.138) What happened after the well was deepened and after petitioner had been paid and its employment had ceased, was none of its concern. It did not know, and could not know, and had no interest in finding out, what the lessee oil company might do, or might determine to do, with respect to going deeper into a lower strata. The fact that oil might be found there, and particularly that if so found it might move in interstate commerce, does not, we

submit, make the transaction in which petitioner was engaged one constituting interstate commerce. That the products might ultimately move in interstate commerce would not bring respondents within the purview of the act.

In Interpretative Bulletin No. 1, published by the Federal Administrator of the Wage and Hour Division, October, 1940, it is so stated. We quote:

"Employees are engaged in the production of goods for commerce where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. If, however, the employer does not intend or hope or have reason to believe that the goods and production will move in interstate commerce, the fact that the goods ultimately do move in interstate commerce would not bring employees engaged in the production of these goods within the purview of the act."

That test has received the approval of this court in *United States v. Darby Lumber Company*, 312 U. S. 144, 61 S. Ct. 451, in which it was said that production of goods for commerce as used in the act includes at least production of goods which at the time of production, the employer according to the normal course of his business, intends or expects to move in interstate commerce.

To indulge the presumption, as the court did, that one is presumed to know what he ought to know, merely begs the question. What ought the petitioner to know? It was argued that it was presumed to know, and could not shut its eyes to "the elementary facts of the oil business." But the oil business was not petitioner's business. It could, of course, be presumed that petitioner knew all about the handling and operation of rotary drilling machines because that was its business, and its sole business, but it is going too far

to impute to it the knowledge of another business which may be in a sense, related indirectly to interstate commerce. Of course, every man is presumed to know that which is of such notoriety as to be matter of common knowledge, but the data revealed by the publications referred to, and upon which alone petitioner's knowledge is predicated, cannot be included in that category. It might as well be argued that the driver of a delivery truck for a wholesale grocery establishment should be charged with knowledge of the elementary facts of the grocery business, as to charge petitioner with knowledge of the elementary facts of the oil business. There is no legitimate basis for ascribing to petitioner an intent, expectation or belief that oil or gas would be found in the completed well, or even that the lease owner would determine to complete it, or that, if completed, and oil or gas were found, the same would move in interstate commerce. That interstate commerce might be affected by what petitioner was employed to do does not make the act applicable. The act by its terms is limited to employees engaged in interstate commerce or in the production of goods for interstate commerce. It does not extend to employment that merely affects interstate commerce.

In the bulletin above referred to, and indeed in the decided cases, the word "employer", is referable to the owner of the physical property utilized in the production of goods, and therefore beneficially interested in such production. The petitioner is in no such situation for it had no beneficial interest whatever in the production, and it therefore could hardly be accused of indulging the hope or expectation of production, whether it moved in interstate commerce or not.

It is, of course, the nature of the employee's occupation

that determines whether or not that employer is subject to the act. *Fleming v. Kirschbaum*, 38 Fed. Suppl. 204.

In *Gerdert, et al., v. Certified Poultry and Egg Co.*, 38 Fed. Suppl. 964, it was said:

"The minimum wages and maximum hours provision of the Fair Labor Standards Act relates to employees who are engaged in commerce, or in the production of goods for interstate commerce, but it is difficult to see how an employee could be engaged in commerce unless his employer were likewise engaged, because the employee is merely agent of the employer."

In a footnote to the opinion, the language of Senator Pepper, a member of the Conference Committee which drafted the act, he states as follows:

"I want it distinctly understood that this proposed law * * * is applicable only to those employees who themselves are engaged either in interstate commerce, or the production of goods for interstate commerce."

In *National Labor Relations Board, v. Jones and McLaughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893, it is said:

"Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

But it was further said:


"The scope of the power of Congress over interstate commerce may not be so extended as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a complete centralized government."

Petitioner's employment, and his job under that employment was a purely local activity. The act therefore does not apply, unless it can be said that there was such a close and substantial relation between that activity and interstate commerce; that petitioner itself was, in respect to such activity, motivated by the belief, hope, expectation or intention to produce goods for interstate commerce. We submit that such belief, hope or intention cannot be fairly imputed to petitioner or to respondents as its employees. Indeed, we think it will be evident from the discussion under Proposition II that neither of the parties considered that they came within the act.

PROPOSITION II.
(Specification of Error No. 2.)

A. Where a laborer is employed on a job without an express agreement as to wages, but expecting to be paid a weekly wage of a certain sum based upon an eight-hour day until the job is finished, and he accepts such amount in full satisfaction, and such payment is more than sufficient in amount to cover the minimum and overtime wage scale provided in the Fair Labor Standards Act, an agreement will be implied for a basic and overtime wage scale in compliance with the act; and

B. That the acceptance by respondents of the compensation tendered by petitioner, as their employer, and accepted by them without objection, claim, or demand for an additional amount for overtime, and without notice that a claim for overtime will be made or presented should not subject petitioner to the penalty of double overtime.



A

The evidence here is that each well worked upon by the respondents was a separate independent job. In so far as there was evidence as to how the respondents went to work, it appears that they merely joined themselves to a rotary drilling crew without any express agreement as to wages. Each of them had in his mind that he would work eight hours each day, seven days per week, until the rotary drilling on that well was finished, and he expected to be paid a certain amount for his labor on the well. (R. 58) He was paid for his work in accordance with that expectation, and the payment he received was in each instance more than sufficient to provide for a basic wage scale and time and a half for overtime as provided by the Fair Labor Standards Act.

It was definitely held in *Fleming, Admr., v. A. H. Belo Corporation*, 121 F. (2d) 207, that the Fair Labor Standards Act was not intended to and did not create a prohibition against or limitation upon working extra hours, and that the act was designed primarily, as its very title indicates, to establish and maintain a fair minimum wage throughout the Nation as to industry engaged in commerce or in the production of goods for commerce. Under authority of that case, the petitioner here could have made an express agreement with the respondents for a wage scale that would have paid them very much less than they did receive from the petitioner for their labor. If the petitioner had not paid the respondents when their work was performed, without agreement as to wages, the respondents would have had a legal right to recover from the petitioner only upon the ground of an implied contract. In such an action, what amount could they have recovered? Certainly not more than they themselves expected when they performed the work. They

have received that amount under their own testimony and in full satisfaction of what they claimed at the time. Now they are claiming in this suit an additional amount, plus penalty and attorney's fees, on the ground of an alleged violation of the Fair Labor Standards Act.

We earnestly insist that since this action is necessarily based upon an implied contract, the implication can and must be that the contract was not in violation of the law, but in compliance therewith.

It is an established rule of law that "a promise will not be implied where an express promise would be contrary to law." 12 Am. Juris. 500.

In *Dunphy v. Ryan*, 116 U. S. 491, 29 L. ed. 703, 6 S. Ct. 486, the Supreme Court said:

"The law implies a contract only to do that which the party is legally bound to perform."

So, on this point, we say that if the occupation of petitioner in drilling wells should be considered the production of goods for commerce, and if it be held that the respondents were engaged in the production of goods for commerce, we respectfully submit that there is no violation here of the Fair Labor Standards Act, for the payment which the respondents each received for his labor was, under the implied agreement, more than amply sufficient to constitute full compliance with the provisions and requirements of the act.

B.

Aside from the foregoing discussion, and as we pointed out, the respondents, at the time they were paid, expressed no dissatisfaction with such payment tendered to each of them, as their compensation in full, nor made any

demand for additional pay for overtime, nor accepted their wages upon the condition that payment of overtime would be later paid to them, nor gave notice at the time of payment that they would hold petitioner liable for overtime. This, we submit, is not fair dealing on their part, with petitioner, and should preclude them from asserting, long afterwards, that petitioner is liable for the penalty prescribed by the act, for of course such provision of the statute should be strictly construed.

Take, for illustration, the case of W. M. Slaid, one of the respondents, who received and expected to receive \$11.00 a day for seven days per week, or seven fours. How long a period in all he worked, we are not advised, but the pay checks received by him from petitioner were on the basis of \$77.00 per week of seven days. How much overtime he worked, or what period is covered by his overtime, or indeed by any of the respondents, the record fails to show. The court, however, allowed him \$379.50 for overtime on the basis of eleven dollars per day at \$1.375 per hour, and to which was added the penalty of double the amount of overtime, in all \$759.00. (R.142) His silence with respect to overtime, and his failure to demand it during the whole period of his employment, when he received his pay checks raises a strong presumption that both parties understood that such payment would be the entire compensation coming to him in compliance with the act. There is only one instance of an employee of petitioner making a claim of overtime. R. E. S. Morgan (R. 90) says he demanded it on December 22, 1940. As he worked from January, 1939, to September, 1940, (R. 90) such demand was three months after his employment had ceased, long after he had been paid his compensation in full, and had accepted it, like his co-employees, without

anything being said about overtime. This demand was clearly an afterthought and negatives an intention to claim overtime when he received his last pay check three months before.

If we cannot imply an agreement that the payments to respondents were in full of their entire compensation, then the petitioner, as their employer, was deceived and misled to its injury by their silence as to any claim of overtime and their acquiescence in the payment made. Had it not been so deceived and misled, it could, and probably would, either have reduced their wage, or have continued his wage of \$77.00 per week with the express understanding and agreement that it would cover overtime, if any, each week. The same of course applies to each of the respondents.

We submit that under the facts of this case the judgment rendered against petitioner for \$4,792.94, for violation of the Fair Labor Standards Act is unjust and should be reversed.

Respectfully submitted,

FRANK SETTLE,

EUGENE O. MONNET,

SAM CLAMMER,

Attorneys for Petitioner.

